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Supreme Court of the United States

OCTOBER TERM—1921.

No. 312.

MINNA LOMBARD CRICHTON,
Appellant,

against

MAGGIE L. WINGFIELD,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLEE'S POINTS.

LOUIS MARSHALL,
JAMES MARSHALL,
Appearing Specially for Appellees.

PRESS OF FREMONT PAYNE, 80 Washington Street, New York City.

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Supreme Court of the United States

OCTOBER TERM—1921.

No. 312.

MINNA LOMBARD CRICHTON, Appellant, against MAGGIE L. WINGFIELD, Appellee.	Appeal from the District Court of the United States for the Southern District of New York.

APPELLEE'S POINTS TO SUSTAIN DISMISSAL OF THE BILL FOR LACK OF JURISDICTION.

This action was brought in the District Court for the Southern District of New York, by the plaintiff, who is a citizen of the State of New York, against the defendant, who is a citizen of the State of Mississippi and resides at Clarksdale, Coahoma County, in that State, to procure an adjudication that an assignment to the defendant by the plaintiff's father, Ephraim H. Lombard, of an interest in certain promissory notes constitutes a cloud on their title claimed by plaintiff, to enjoin the defendant from asserting any claim to them, to require her to cancel and surrender the assign-

ment thereof held by her, and to restrain her from interfering with the plaintiff in their collection (*Rec.*, pages 1 to 6).

The notes referred to in the bill of complaint are fourteen in number, were executed by W. D. Corley at Clarksdale, Mississippi, on January 1, 1917, and made payable to Eva W. and E. H. Lombard or bearer at the Bank of Clarksdale, Clarksdale, Mississippi. Seven of them were for $31,480 each, and seven were interest notes given for sums aggregating $39,664.80. It is alleged by the plaintiff that these notes are physically in the State of New York (*Rec.*, page 2). Eva W. Lombard was the plaintiff's mother. Ephraim H. Lombard was her father. The defendant is his surviving sister and the plaintiff's aunt.

Paragraphs Seventh, Eighth and Ninth of the bill of complaint are as follows (*Rec.*, pages 2 and 3):

> "SEVENTH.—That plaintiff claims ownership of said notes *under the Wills of her deceased mother and father*, respectively.
>
> EIGHTH.—That shortly before the death of plaintiff's father, while he was in failing health, it is claimed by the defendant that he executed to her, the said defendant, a certain paper, a copy of which is hereto annexed, marked 'Exhibit A' assigning to her a one-half interest in all of said principal notes, Numbered 4 to 9, inclusive, and one-half of said interest notes Numbered 4 to 9 inclusive. Said notes are deferred payments on the sale of a plantation in the State of Mississippi and were executed to the father and mother of the plaintiff, and are bearer notes.

NINTH.—Plaintiff alleges that at the time the said alleged assignment was executed, her said father was of unsound mind, memory and understanding, and incapable of, and (did not sign or execute said alleged assignment, or if the same was signed by him, said Ephraim H. Lombard) did not understand or know, and was not capable of understanding or knowing that he was executing or signing an assignment of his interest in the said principal and interest notes, and that he did not intend to sign or execute any such instrument assigning his said interest to the defendant; and at said time, and for a long time prior thereto, her said father was mentally incapable of attending to any business of any nature whatever, or of making any contracts of any sort, or executing any conveyances; and the plaintiff further alleges that the said alleged assignment was obtained by the defendant through undue influence exercised by the said defendant upon her said father, and was without any consideration, and was obtained by the said defendant while she had complete control and mastery over the mind of the said Ephraim H. Lombard, who, for a long time prior thereto, had been afflicted with a disease that made him mentally incapable, which disease started on or about July 1st, 1918, and lasted up to and including the date of his death, to wit, November 3rd, 1919; and at no time during said period did plaintiff's father recover his full mental capacity."

The assignment from plaintiff's father to the defendant which is charged to constitute a cloud on plaintiff's title, forms a part of the bill of com-

plaint (*Rec.*, pages 6 and 7). It was executed and acknowledged before a notary public at Clarksdale, Mississippi, on August 1, 1919. It assigned to the defendant the interest of E. H. Lombard, in these notes. They are stated to be secured by deed of trust dated January 1, 1917, given by W. D. Corley to W. D. Cutrer, Trustee for E. H. Lombard and Eva W. Lombard, which deed of trust was duly recorded in the Records of Land Mortgages and Trust Deeds in the office of the Chancery Clerk of Sunflower County, Mississippi. The Clerk was by the terms of the instrument authorized, empowered and instructed to note on the margin of the record where the deed of trust is recorded that the assignment of the notes had been made as provided in the instrument.

The defendant has not been served with process in the Southern District of New York; but on plaintiff's application an order was made directing process to be issued against the defendant requiring her to appear in the District Court for the Southern District of New York, on January 21, 1921, the order directing the Clerk of that Court to issue and deliver a certified copy of the order and of the bill of complaint, together with the subpoena issued thereon, to the United States Marshal for the Northern District of Mississippi, commanding him to serve them upon the defendant and make known the contents of the bill of complaint to her (*Rec.*, pages 8 and 9). Such service was made at Clarksdale, Mississippi, on December 31, 1920 (*Rec.*, page 11).

Thereupon a special appearance was entered for the defendant solely for the purposes of a motion to quash the service of process attempted to be made upon her on the ground that she is a resi-

dent, citizen and inhabitant of the State of Mississippi and that the attempt to serve her in that State with process herein was without authority of law, and for a dismissal of the bill of complaint on the ground that the District Court for the Southern District of New York had not acquired jurisdiction over the defendant or over the subject-matter of this action, in that this case is not one that comes within the provisions of Section 57 of the Judicial Code or of any statute establishing the jurisdiction of the District Court. A motion was made accordingly (*Rec.*, pages 12 and 13).

It appears without contradiction that W. D. Corley, the maker of these notes, is not a resident or citizen of the State of New York, but resides in Colorado; that Eva W. and E. H. Lombard, the payees of the notes, were during their respective lives residents and citizens of the State of Mississippi; that W. D. Cutrer, the Trustee named in the deed of trust to secure the notes, was in his lifetime a citizen and resident of Coahoma County, Mississippi; that these notes were given for land purchased by Corley from E. H. Lombard, and that this land was subsequently sold by Corley to M. P. Sturdivant and J. A. May, who are residents and citizens of the State of Mississippi. Upon making the purchase they assumed the payment of these notes. Subsequently they conveyed the land to J. W. Cutrer, Oscar Johnston, Oscar Carr and W. A. Ritchie, who assumed the payment of these notes. All of them are residents and citizens of the State of Mississippi (*Rec.*, pages 15, 16, 38, 39).

It also appears that Eva W. Lombard died on May 25, 1919, a citizen and resident of Coahoma County, Mississippi, leaving a last will and testament in which the plaintiff was named as execu-

trix. On plaintiff's petition this will was admitted to probate by the Chancellor of the Second Chancery Court District of Mississippi, and the plaintiff qualified as executrix and entered upon the performance of her duties. The decree declared "that the personal property devised by the last will is all located in the said Second District of Coahoma County, Mississippi, the place of residence of said decedent at the time of her death" (*Rec.*, pages 29 to 36).

After her qualification as executrix plaintiff returned to Westchester County, New York, and took with her the notes payable to Eva W. Lombard and E. H. Lombard, without the consent of her father, who survived his wife. She not only did this, but, as shown by the affidavit of Honorable Earl Brewer, Governor of Mississippi from 1912 to 1916, she checked out the money that her father had on deposit at the bank in Clarksdale, and took from a lock-box in the bank all notes, securities, insurance policies and all other property of her father, and left him sick in bed and penniless. Her father sought to persuade her to return the property, and especially the notes which belonged to him and his wife jointly, and advised with Governor Brewer as to the course to be pursued. This resulted in the preparation of a bill in equity, but before process was served an interview between the plaintiff and her father took place and she agreed to return his property at an early day and to give him sufficient money to pay his bills and to take care of him until she returned with the property. She gave Governor Brewer, some money, which was deposited in the bank at Clarksdale, for her father, but declared that she had changed her mind and did not intend to return the property

or any part of it to Mississippi, that she had it in New York out of the jurisdiction of the courts of Mississippi, and that she was going to keep it there. Thereupon her father assigned his interest in the notes to the defendant, his sister (*Rec.*, pages 26 to 28).

Athough the plaintiff gave a conflicting version of this conversation, she admitted that the subject of the return of the notes was seriously discussed, and that she gave $500 to Governor Brewer for her father. She annexed to her affidavit a copy of a letter dated July 12, 1919, addressed by her to her father, in which she informed him of the deposit, and added:

> "I also agree with you that I will return some time *between this and January 1st and bring all your notes and papers*, and have a settlement with you along the lines we discussed to-day. I am not to turn over to you any notes until a settlement is made satisfactory to us both." (*Rec.*, page 55.)

In her affidavit, however, she gives an entirely different version of this letter, for there she says that she stated:

> "I promise to bring the notes and papers *belonging to my father* back to Mississippi whenever the settlement of the estate is made, or at the first of the year for income tax reports. Under no conditions are the notes ever to leave my possession, or the possession of my lawyer, Mr. J. W. Cutrer." (*Rec.*, page 82.)

As is shown by the bill of complaint, the assignment of the notes by E. H. Lombard to Mrs. Wing-

field was made on August 1, 1919. The plaintiff evidently heard of the execution of a document and inferred that it must be a will. She thereupon returned to Mississippi in great haste and induced her father to execute a will in her favor on August 12, 1919. (*Rec.*, pages 21, 53.)

This, in view of the allegations of paragraphs Seventh, Eighth and Ninth of the bill of complaint and of the subsequent acts of the plaintiff in connection with the will, shows beyond peradventure that if the will under which she claims these notes was a valid instrument and her father was legally competent to execute it, then the assignment made by him to the defendant, eleven days before, cannot be subject to the sole attack that is made upon it, namely, that he was afflicted with a disease that made him mentally incapable, that this disease began about July 1, 1918, and continued to and including the date of his death, November 3, 1919, and that at no time during that period did he recover his full mental capacity.

Shortly after the execution of this will the plaintiff took her father with her to Westchester County, New York, where, as stated, he died on November 3, 1919. She then returned to Clarksdale, Mississippi, with his body, interred it, and at once took proceedings for the probate of his will on November 6, 1919, in the Chancery Court of the Second District of Coahoma County, Mississippi. In her petition for probate she alleged (*Rec.*, page 17):

> "Your petitioner, Minna Ethel Chrichton, respectfully represents that on the 3rd day of November A. D., 1919, Ephraim H. Lombard, late of the Second District of Coahoma County, Mississippi, departed this life, *leaving a last will and testament duly signed, published*

and attested, as your petitioner believes, and which she, in pursuance of statute, herewith presents to your Honor for probate."

At her instance the attesting witnesses to the will were examined as to its execution by the testator, and they testified that on August 12, 1919, he "was then of sound and disposing mind and memory." (*Rec.*, pages 21, 22.) On the same day the Court admitted the will to probate, the decree reciting that it was "upon the petition of Minna Ethel Chrichton, duly verified, for the probate of a certain instrument of writing, purporting and alleged to be the true and only last will and testament of Ephraim H. Lombard, deceased, late a resident of the Second District of Coahoma County, Mississippi, and for letters testamentary thereupon." (*Rec.*, page 19.) The decree further recites that the Court, having been satisfied by proofs that the instrument propounded was the true and only last will and testament of Ephraim H. Lombard "that said decedent was at the time of his death a resident of the Second District of Coahoma County, Mississippi, *and that the personal property bequeathed and devised by the said last will and testament, is located in the said Second District of Coahoma County, Mississippi* * * * and that the lands devised by the said last will and testament are situated in Bronxville, in the City of Yonkers in the State of New York and in Florida" and that the said testator was "on the 12th day of August, 1919, of lawful age to devise, *and of sound and disposing mind, memory and understanding*, and of right and in law entitled to make said will." It was then adjudged that the will was proved and established and ad-

mitted to probate, and thereupon granted the plaintiff letters testamentary. (*Rec.*, page 19.)

It further appears from the certificate executed by the Judge of the Chancery Court of the Second Judicial District of Coahoma County, Mississippi, that the plaintiff has never received permission, either in her capacity as executrix of the Estate of E. H. Lombard or as executrix of the Estate of Eva W. Lombard, from the court having jurisdiction of the estates of E. H. Lombard and Eva W. Lombard, respectively, either in term or in vacation, or from the Judge of the Court, to remove any of the property of either of these estates out of Mississippi, and that no other person has been granted permission to remove such property out of the State. The Court further certified that the respective estates of E. H. Lombard and Eva W. Lombard have not been wound up, that no final accounting or order has been filed with respect to either of these estates, and that the plaintiff, as executrix, has not applied for her discharge and has not been discharged, and that the proceedings relating to said estates are now open and unsettled in the Chancery Court (*Rec.*, pages 24, 25).

It likewise appears that no ancillary letters of administration on the estate of E. H. Lombard have been issued by the Surrogate's Court of Westchester County, New York, although his will was recorded there, he being the owner of an interest in real estate located in that county (*Rec.*, page 38).

It is further shown that by Section 2102 of the Code of Mississippi it is provided (*Rec.*, pages 28, 29):

"Chapter 47.

Executors and Administrators.

2102. (1928) Property not to be removed from the State, and penalty therefor. An executor or administrator shall not remove any of the property of the estate out of this State. If a Chancellor or Clerk of a Chancery Court shall be satisfied, by petition or otherwise, in term time or vacation, that any executor or administrator is about to remove the property of the estate out of this State, he shall issue a precept to the Sheriff of the proper county, commanding him to seize the property about to be removed and hold the same until legally disposed of, and the letters of such executor or administrator may be revoked, on due notice, and administration de bonis non granted to some other person. And in case of such removal, suit may be forthwith instituted on the bond by any of the distributees or creditors of the estate; and, on satisfactory evidence of the removal of the property out of the State, judgment shall be rendered for the full value thereof, and such other damages as the parties suing shall have sustained."

POINTS.

I.

No property was located in the Southern District of New York, within the meaning of Section 57 of the Federal Judicial Code, which affords a basis for the exercise of jurisdiction by the District Court with respect thereto, as against the appellee, a resident and citizen of Mississippi, who was not found or served with process in that district and who did not voluntarily appear therein.

Section 51 of the Judicial Code provides:

> "Except as provided in the five succeeding sections, no person shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

The words "inhabitant," "resident" and "citizen" as used in this and the following provisions of the statute, all connate the idea of domicile. A person sued must be a resident as well as a citizen of the district in which suit is brought.

Shaw vs. *Quincy Mining Co.*, 145 U. S., 444;

United States vs. *Gronich*, 211 Fed. Rep., 548;

Pacific Mutual Life Ins. Co. vs. *Tompkins*, 101 Fed. Rep., 539.

There is nothing in any of the following sections except section 57 that is claimed to confer on the appellant the right to proceed against the defendant in the Southern District of New York. It is there provided:

> "When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear,

plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same state, such suit may be brought in either district in said state * * *."

The property from which a cloud is sought to be removed consists of twelve of the fourteen promissory notes described in the bill of complaint and are those specified in the assignment from Ephraim H. Lombard to the defendant. These notes were made in Mississippi and were payable there. The persons liable upon these notes are residents and citizens of Mississippi. The trust deed to secure the payment of these notes was executed to a citizen of Mississippi and is a lien upon property located there. The payees were likewise citizens and residents of Mississippi.

Both the plaintiff and the defendant claim title to these notes under Ephraim H. Lombard. His will

under which the plaintiff claims, and the assignment, under which the defendant claims, were executed in Mississippi. The wills of Ephraim H. Lombard and of Eva W. Lombard, under which the plaintiff seeks to deduce her title were at her instance admitted to probate in the proper Chancery Court of Mississippi, and these estates remain unsettled, the Mississippi court still retaining jurisdiction over the property belonging to both testators at the time of their respective deaths. Moreover, there are unpaid debts outstanding against both estates (*Rec.*, page 53).

It is also of significance that the notes have been taken out of the State of Mississippi by the plaintiff, without permission of the Chancery Court and in violation of the prohibition of the statute, and there is no pretense that any consent for such removal was obtained from anybody in authority. Hence the notes were unlawfully brought into the Southern District of New York.

Assuming, for the sake of the argument, that the plaintiff, in spite of her illegal acts, has valid title to her mother's half interest in the notes, there remains the question as to the title to the half interest in the notes that belonged to her father and in the debt represented by them.

Wharton, in his work on the *Conflict of Laws*, Vol., II, Section 612a. (Third Edition), lays down the proposition:

> "While for some purposes the situs of a simple contract debt is at the domicil of the creditor, its situs for the purpose of administration is at the domicil of the debtor, rather than the domicil of the creditor or the place where the evidence of the debt may be found.

> According to the weight of authority the rule applies even to debts evidenced by negotiable instruments which are not in the state of the debtor's domicil, though there is some conflict upon the point. So, the situs of corporate stock for the purpose of administration is in the state where the corporation is domiciled, and not in the state where the decedent was domiciled, or where the certificates representing the stock are found."

This rule is the basis of the decision in *Wyman* vs. *Halstead*, 109 U. S., 654, 656, where Mr. Justice Gray said:

> "The general rule of law is well settled, that for the purpose of founding administration all simple contract debts are assets at the domicil of the debtor; and that the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because the bill or note does not alter the nature of the debt, but is merely evidence of it, and therefore the debt is assets where the debtor lives, without regard to the place where the instrument is found or payable."

The leading Mississippi case on this subject is *McIlroy* vs. *Alsop*, 45 Miss., 365. There, a resident of Kentucky died, owning a note of a resident of Mississippi, secured by a lien on land in Mississippi. The resident of Kentucky died in his home State. The will was probated in both States and letters of administration were granted upon it to one executor in Kentucky and to another in

Mississippi. The note fell into the hands of the Kentucky executor, who retained it and insisted on the right to collect it. It was held, however, that the note was assets in Mississippi and that the Mississippi administrator was entitled to collect it, and the fact that the note, which the Court held was a mere evidence of indebtedness, was in the hands of the Kentucky executor was no bar to the right of the Mississippi administrator to collect it. The Court by Simrall, J., in the course of the opinion said (page 375):

> "There can be no doubt that whatever debt (growing out of the transactions set out in the bill) may be owing from the estate of Kinchen Exum to the estate of Jesse Alsop, it constitutes a part of the assets of the latter estate in Mississippi, and rightfully belongs to the legal representative here. The debtor resided here, the property sought to be subjected to its payment is here. McIlvoy by virtue of his appointment as adminstrator in Kentucky has no character or office as such in this state; he cannot sue in our courts. When Robert B. Alsop was appointed administrator, etc., the law charged him with administration of all the assets in Mississippi. This being a debt due here, it was his duty to take measures for its collection. The fact that the 'evidence' of the debt was in the hands of the Kentucky administrator, did not destroy its character as Mississippi assets, nor defeat his right of recovery. It might embarrass his remedy. As to McIlvoy, the *pro confesso* against him admits the allegations of the bill on this point, that Redding, the executor, in-

> ventoried the note here, and took it with him to Kentucky, and from him, as part of the papers of the estate, it came to the possession of his successor. After the note became due, it was still in McIlvoy's possession. The protection in favor of a bona fide holder for value would not inure to his assignee. No better title would pass than McIlvoy had. No right would be transferred as against the superior title of the administrator here. If McIlvoy, in dereliction of his plain duty, should persist in retaining the note, we are satisfied that the administrator here may collect the debt, the chancery court taking due precautions, for the benefit of those responsible for its payment, against the risk and danger of trouble and costs in making a defense against an assignee."

The doctrine of these cases was applied in *Buck* vs. *Beach*, 206 U. S., 392, where it was held that mortgage notes made and payable in Ohio and secured by mortgages on property in that State, the owner whereof resides in New York but which are kept for safekeeping in Indiana, are not taxable in the latter State. In the course of his opinion Mr. Justice Peckham said:

> "The sole question then for this court is whether the mere presence of the notes in Indiana constituted the debts of which the notes were the written evidence, property within the jurisdiction of that State, so that such debts could be therein taxed. Generally, property in order to be the subject of taxation must be within the jurisdiction of the power assuming to tax (page 400). The property really taxed

was the debt itself, as each separate note was taxed at the full amount of the debt named therein or due thereon. And jurisdiction over these debts for the purpose of taxation was asserted and exercised solely by reason of the physical presence in Indiana of the notes themselves, although they were only written evidence of the debts which were in fact thereby taxed (page 402).

"A distinction has been sometimes taken between bonds and other specialty debts belonging to the deceased, on the one hand, and simple contract debts on the other, for the purpose of probate jurisdiction, and the probate court, where the bonds are found, has been held to have jurisdiction to grant probate, while in the other class of debts (including promissory notes) jurisdiction has attached to the probate court where the debtor resided at the death of the creditor. 1 Williams on Executors, 6th Am. from 7th English ed., bottom paging 288, 290, note (h): Wyman vs. Halstead, Admr., 109 U. S., 654. See also Beers vs. Shannon, 73 N. Y., 292; Owen vs. Miller, 10 Ohio St., 136. Under such rule the debts here in question were not property within the State of Indiana, nor were the promissory notes themselves, which were only evidence of such debts. The rule giving jurisdiction where the specialty may be found, has no application to a promissory note. Assuming such a rule, the case here is not covered by it" (page 403).

In *Chicago, Rock Island and Pacific Railway Co.* vs. *Sturm*, 174 U. S., 710, the effect of an attach-

ment of a debt owing to Sturm by the company in a proceeding instituted against Sturm in Iowa upon an action brought by Sturm against the railroad in Kansas, was under consideration. The railroad company, which was the debtor, was a corporation organized under the laws of Iowa. The determination of the case depended upon the question whether the situs of the debt was in Kansas, the domicile of the creditor, or in Iowa, the domicile of the debtor. The State court had decided that the situs of the debt was either with the owner thereof or at his domicile or where the debt is to be paid. This Court, however, held otherwise, Mr. Justice McKenna saying:

> "The proposition is supported by some cases, it is opposed by others. Its error proceeds, as we conceive, from confounding debt and credit, rights and remedies. The right of a creditor and the obligation of a debtor are correlative but different things, and the law in adapting its remedies for or against either must regard that difference. Of this there are many illustrations, and a proper and accurate attention to it avoids misunderstandings. This court said by Mr. Justice Gray in Wyman vs. Halstead, 109 U. S., 654, 656; "The general rule of law is well settled, that for the purpose of founding administration all simple contract debts are assets at the domicile of the debtor." And this is not because of defective title in the creditor or in his administrator, but because the policy of the state of the debtor requiring it to protect home creditors. Wilkins vs. Ellett, 9 Wall., 740; 108 U. S., 256. Debts cannot be assets at the domicil of the debtor if their

locality is fixed at the domicil of the creditor, and if the policy of the state of the debtor can protect home creditors through administration proceedings, the same policy can protect home creditors through attachment proceedings. * * *

"Our attachment laws had their origin in the custom of London. Drake, §1. Under it a debt was regarded as being where the debtor was, and questions of jurisdiction were settled on that regard * * * (page 714).

"The idea of locality of things which may be said to be intangible is somewhat confusing, but if it be kept up the right of the creditor and the obligation of the debtor cannot have the same, unless debtor and creditor live in the same place. But we do not think it is necessary to resort to the idea at all or to give it important distinction. The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a non-resident to the defeat of his creditors. To do it he must go to the domicil of his debtor, and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He and he only has something in his hands. That something is the *res*, and gives character to the action as one in the nature of a proceeding *in rem*. Mooney vs. Buford & George Mfg. Co., 72 Fed. Rep., 32; Conflict of Laws, §549, and notes" (pages 715, 716).

A similar question arose in *Blackstone* vs. *Miller*, 188 U. S., 189, where the question presented was

as to whether or not a deposit in a trust company in New York made by a citizen of Illinois who was domiciled in that State, was subject to the New York transfer tax upon the death of the depositor. It was held that it was, Mr. Justice Holmes saying (page 205):

> "But it is plain that the transfer does depend upon the law of New York, not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor. The principle has been recognized by this court with regard to garnishments of a domestic debtor of an absent defendant. Chicago, Rock Island and Pacific Ry Co. vs. Sturm, 174 U. S., 710. See Wyman vs. Halstead, 109 U. S., 654. What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay. It does not matter that the law would not need to be invoked in the particular case. Most of us do not commit crimes, yet we nevertheless are subject to the criminal law and it affords one of the motives for our conduct. So again, what enables any other than the very creditor in proper person to collect the debt? The law of the same place. To test it, suppose that New York should turn back the current of legislation and extend to debts the rule still applied to slander that actio personalis moritur cum persona, and should provide that all debts hereafter contracted in New York and payable there should be extinguished by the death of either party. Leaving constitu-

tional considerations on one side, it is plain that the right of the foreign creditor would be gone."

Under the law of Mississippi, which is the same as that announced by this Court, the property in the debt evidenced by these notes is located in the State of Mississippi. It matters not that the notes are in another state. It would not have changed the situation had the plaintiff procured ancillary letters for the administration of her father's estate in New York, for the *situs* of the debts was at the domicile of the obligors and, therefore, outside the jurisdiction of New York in the same sense and just as surely as any tangible property would be without its jurisdiction, although the evidence of title thereto (deeds, receipts, assignments, etc.) were in New York.

It further appears that the Mississippi court, in its decree which on appellant's petition admitted to probate the will of Ephraim H. Lombard (Exhibit A), affirmatively found that "*the personal propery bequeathed and devised by the said last will and testament is located in the said Second District of Coahoma County, Mississippi.*" (*Rec.*, page 19.)

A similar provision is contained in the decree admitting the will of Eva W. Lombard to probate. (*Rec.*, page 31.)

It is settled law that the mere presence within a federal district of the evidence of indebtedness does not of itself establish the right to jurisdiction under Section 57 of the Judicial Code. It is the *locus* of the rights represented by the certificate of indebtedness that controls. The cloud which it is sought to dispel must be upon those rights, and those rights must be within the district.

Jellenik vs. *Huron Copper Mining Co.*, 177 U. S., 1, was a suit brought in the Circuit Court of Michigan by citizens of States other than Michigan against a Michigan mining corporation and individual defendants holding shares of stock in that corporation who resided in Massachusetts. The plaintiffs claimed to be the real owners of the stock, the certificates of which were held by the Massachusetts defendants. Plaintiffs sought a decree removing the cloud upon their title to the shares. It was held that within the contemplation of the Act of Congress of March 3, 1875, 18 Stat., 470, c. 137 (which is the source of the present Section 57 of the Judicial Code), the stock held by the citizens of Massachusetts must be deemed personal property within the district where the corporation was domiciled. The certificates of stock, said the Court, were mere evidences of ownership. The interest represented by the shares was held by the company for the benefit of the true owner at its domicile, and the Circuit Court of the district in which such domicile was established was, therefore, possessed of jurisdiction. In the course of his opinion, Mr. Justice Harlan, after quoting from the statutes of Michigan which defined the character of the stock of a corporation organized under the laws of that State, said:

> "These provisions make it clear that by the law of Michigan the shares of stock in the defendant company are to be deemed personal property, transferable on the books of the company; and that the share or interest of a stockholder may be taken in execution or reached by attachment, a copy of the execution or attachment being left by the officer with the clerk, treasurer or cashier of the company.

The authority of the State to establish such regulations in reference to the stock of a corporation organized and existing under its laws cannot be doubted. We need not discuss, in the light of the authorities, whether the shares of stock in the defendant company may not be accurately described as chattels or choses in action, or property in the nature of choses in action. * * * It is sufficient for this case to say that the State under whose laws the company came into existence has declared, as it lawfully might, that such stock is to be deemed personal property. That is a rule which the Circuit Court of the United States sitting in Michigan should enforce as part of the law of the State in respect of corporations created by it. The stock held by the defendants residing outside of Michigan who refused to submit themselves to the jurisdiction of the Circuit Court being regarded as personal property, the act of 1875 must be held to embrace the present case, if the stock in question is 'within the district' in which the suit was brought. * * * But we are of opinion that it is within Michigan for the purposes of a suit brought there against the company—such shareholders being made parties to the suit—to determine whether the stock is rightfully held by them. The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the company for the benefit of the true owner. As the habitation or domicile of the company is and must be in the State that created it, the property represented by its certificates of stock may be deemed to be held by the company within the State whose crea-

ture it is, whenever it is sought by suit to determine who is its real owner."

Hodgman vs. *Atlantic Refining Co.*, 274 Fed. Rep., 104 proceeds on the same theory.

In *Hudson Navigation Co.* vs. *Murray*, 233 Fed. Rep., 466, suit was brought to remove a cloud on the title of stock by the cancellation of other certificates which were alleged to be illegal. In that case the property of the corporation was not within the district where it was incorporated and where suit was brought. It was held that the action could not be maintained in that district, since there was no property there within the meaning of the Code. Judge Haight said (page 469):

"It is clear, therefore, that if the alleged illegal shares of stock cast a cloud upon the title to the shares belonging to the genuine stockholders, jurisdiction in a suit to remove such cloud may be acquired by this court over the defendant by the substituted service provided for in Section 57 of the Judicial Code, because the situs of the valid shares is within this district. But there is a well defined difference between the object of the suit at bar and that of the Jellenik and New Jersey cases above cited. In the latter cases it was sought to remove a cloud upon the legal title to stock, or to determine the legal title, while in the former such is not the purpose, because the illegal stock cannot cast a cloud upon the *legal title* to the genuine stock of the holders thereof. But the illegal stock probably does not cast a cloud upon the equitable title or the interest, which the genuine stockholders have,

by virtue of their shares of stock, *not in the stock*, but in the property of the corporation, since it impairs that title or interest. N. Y. & N. H. R. R. Co. vs. Schuyler, 17 N. Y., 592. However, that fact does not bring the case within the provisions of the statute in question, for the property, upon the equitable title to which the cloud rests, is not the stock, but the property of the corporation, and that, as before shown, is not within this district. The statute makes the location of the property, upon the *title* to which the cloud exists, the decisive factor."

There is nothing in *Chase* vs. *Wetzlar*, 225 U. S., 79, that in any way militates against our position. On the contrary, it sustains it. There Chase, a citizen of Pennsylvania, sued the executors of Gustave J. Wetzlar, who were alleged to be alien subjects of the Empire of Germany residing in Frankfort-on-the-Main. The testator was a citizen and resident of the State of New York at the time of his death, which occurred in 1898. His will was admitted to probate in the Surrogate's Court of New York County. Under the will his son was entitled on reaching the age of twenty-five years to receive a sixth part of the residuary estate. It was also alleged that this share was invested in railroad bonds. By the will it was stated that the executors were residents of the German Empire and express power was conferred upon them to remove the trust estate at any time from the State of New York. A plea was filed showing that no portion of the estate of the testator and no portion of the trust fund of the estate referred to in the bill whereby it was sought to reach this trust fund

"is now or has been for at least five years prior hereto, within the City, County or State of New York nor within the Southern District of New York nor within the United States, but is and has been in Germany in the possession and control of the said Emil Wetzlar there residing." The Court held that the burden of proof as to the existence of property to be affected by the decree within the jurisdiction of the Circuit Court under the statute now under consideration rested on the complainant, on the theory that as to an averment of a fact absolutely necessary to the exertion of the power of the Court to render a binding decree the duty was imposed upon the party pleading to establish the fact, and that the jurisdiction conferred by the statute rested upon a real and not an imaginary or constructive basis. Chief Justice White then proceeded to say:

> "It requires no close analysis to sustain the interpretation given by the court below to the statute, viz., that it exclusively deals with property which is within the district where a suit is brought and which property is therefore capable of being made subject to the dominion and resulting control of the court. No other interpretation is in reason possible in view of the terms of the section causing its provisions to come into play only when there is 'real or personal property within the district where such suit is brought.' * * * We think there is no basis for the contention that the section contemplates the exercise of jurisdiction by a Federal Court upon the assumption of its control over property when there is no property subject to control within the jurisdiction."

In that case, as the opinion shows, the property sought to be reached consisted of bonds. There is authority to support the distinction between a specialty such as a bond, and a promissory note. Mr. Justice Peckham, in *Buck* vs. *Beach*, 206 U. S., at page 407, says:

> "Although public securities, consisting of state bonds and bonds of municipal bodies, and circulating notes of banking institutions have sometimes been treated as property in the place where they were found, though removed from the domicile of the owner, State Tax on Foreign-held Bonds, 15 Wall., 300, 324, it has not been held in this Court that simple contract debts, though evidenced by promissory notes, can under the facts herein stated be treated as property and taxed in the state where the notes may be found."

The cases cited for the appellant do not sustain her contention. Most of them relate to taxation and arise under statutes which, as interpreted, express the intention of subjecting to the taxing power of the Federal or State governments property within the territorial jurisdiction of those governments, and which include as property within such jurisdiction instruments which are the evidence of indebtedness.

DeGanay vs. *Lederer*, 250 U. S., 376, is clearly such a case; as were also *Wheeler* vs. *Sohmer*, 233 U. S., 438. *People ex rel. Westbrook* vs. *Board of Trustees*, 48 N. Y., 390, *People ex rel. Jefferson* vs. *Smith*, 88 N. Y., 576, and *Johrer* vs. *Roscoe*, 62 Miss., 699. None of these cases contravenes the doctrine of *Wyman* vs. *Halstead*, *McIlroy* vs. *Al-*

sop, *Buck* vs. *Beach*, *Chicago*, *Rock Island and Pacific R. R. Co.* vs. *Sturm* or *Blackstone* vs. *Miller*, above discussed. In none of them was the mere physical presence of the evidence of indebtedness in the taxing jurisdiction regarded as controlling.

Thus, in *DeGanay* vs. *Lederer*, the income which was held to be subject to a tax was derived from stocks and bonds of domestic corporations and mortgages secured on domestic real estate owned by an alien non-resident held in the hands of an agent in this country who was empowered to sell, assign and transfer any of them and to invest and reinvest the proceeds as was deemed best by him in the management of the business affairs of the owner.

So in *Wheeler* vs. *Sohmer*, *supra*, the sole question to be determined was as to whether or not an inheritance tax law imposing a transfer tax on property within the State belonging to a non-resident at the time of his death was unconstitutional under the due process clause of the Fourteenth Amendment. That case was one which related to a succession tax, and was distinguished on that ground from *Buck* vs. *Beach*, *supra*, which related solely to a property tax. In the latter case it was pointed out that the notes sought to be taxed really were in Ohio hands for business purposes and were moved backward and forward between Ohio and Indiana with the intent to avoid taxation.

Although the Court was divided in opinion in *Wheeler* vs. *Sohmer*, none of the opinions rendered affords sanction to the assumption of jurisdiction of the present case by the Court below.

In *Wheeler* vs. *Sohmer*, as in *Blackstone* vs. *Miller*, in order to enforce the indebtedness on which a succession tax was levied it would have been necessary to resort to the tribunals of the taxing

State. That in and of itself constituted a sufficient justification for the laying of a succession tax on the property so situated.

As bearing on this subject the decision in *Wilcox* vs. *Ellis*, 14 Kan., 588, which was relied upon in the opinion of Mr. Justice Brewer in *New Orleans* vs. *Stempel*, 175 U. S., 309, is illuminating.

A large part of appellant's brief is confined to the discussion of the question as to whether or not a promissory note constitutes personal property. There can be no doubt but that in many respects it does, especially within the terms of taxing and other statutes which clearly intend that it shall be so considered. These decisions, however, have no application, or, if any, only a remote bearing, on the interpretation of a statute such as that on which jurisdiction depends in a case like the present. Here the act relates to a court of limited jurisdiction. It relates solely to a specified class of cases and to exceptional conditions. It is not intended to enlarge the powers of the Court generally with regard to the issuance of process into remote parts of the country. Its operation is therefore confined to the enforcement of a lien upon or claim to or the removal of an encumbrance, lien or claim upon "the title to real or personal property within the district where such suit is brought." Whereas, in a taxing law, the public interest calls for an interpretation which at least does not hamper the collection of revenue, the very nature of the act now under discussion, in the interest of justice, demands an interpretation which shall not permit a controversy arising in one part of the country to be transferred for adjudication into a district remote from that where the controvesy arose and where the subject-matter had its situs. This is par-

ticularly true where the alleged property, as for example, a promissory note which, after all, is merely an evidence of indebtedness, could be readily and surreptitiously carried from one part of the country to another and the obligation which it represents cannot as in the present case, because of his non-residence be enforced against the obligor within the district to which it has been carried.

So far as the administration of the estate of Ephraim H. Lombard is concerned, the promissory notes, which the appellant asserts to be personal property within the Southern District of New York, not only constituted obligations of persons who resided in Mississippi, were payable there and were secured by a deed of trust on property located there, but jurisdiction over those notes had been acquired by the Chancery Court of Mississippi in the probate proceedings. They continued to be under the control of that court, and were taken out of that jurisdiction by the appellant in violation of the law of Mississippi. To say, under such circumstances, that these promissory notes were personal property within the Southern District of New York within the meaning of Section 57 of the Judicial Code, would give to its language not only an inequitable, but a strained, interpretation. As between the appellant and the appellee, both of whom claim the title to these notes, the fact that the former carried them out of Mississippi into New York should not oust the State of Mississippi of jurisdiction over the controversy or confer it, by serving process on the appellee in Mississippi on the tribunal which appellant has invoked. Otherwise, on the same theory jurisdiction might with like effect have been transferred by her to England or Italy or Bulgaria had she removed the

notes to any one of those countries or to any other country having a statute similar to Section 57 of the Judicial Code. Where as here, the alleged property to which the litigation relates is capable of being transported from state to state and from country to country in one's wallet, such an interpretation would make jurisdiction ambulatory. It is safe to say that it was never intended by Section 57 or by the Act of 1875, whence it is derived to accomplish so extraordinary a result.

Nor are cases such as *Yazoo, &c. R. R. Co.* vs. *Adams*, 181 U. S., 580, *Smiley* vs. *Kansas*, 196 U. S., 447, or *Lindsley* vs. *Natural Carbon Gas Co.*, 220 U. S., 61, in any manner applicable here. They merely pronounce the familiar doctrine that this Court will adopt the interpretation given to the enactment of a State legislature by the highest court of the State. Here, we are dealing with a Federal statute.

Thompson vs. *Emmet Irrigation District*, 227 Fed. Rep., 560, was a bill in behalf of bondholders of an irrigation district, an Idaho corporation, for the purpose of enforcing the payment of interest coupons out of a fund derived from assessments on lands within the district. The action was brought in the jurisdiction where the debtor resided and the fund sought to be reached was located. There is nothing to show where the bonds to which the coupons related were kept.

Jones vs. *Rutherford*, 26 App. D. C., 114, was an action to determine the relative rights of an attorney and his client to a check about to be issued by the Treasurer of the United States. Under Section 105 of the Code of the District of Columbia it was held that the client, who was a non-resident of the District, might be brought within

the jurisdiction of the court by substituted service. The subject-matter of the action had no other situs than the District of Columbia, the matter in controversy being the right of possession of the draft as between two rival claimants, the indebtedness which was the subject-matter of the draft being that of the United States.

In the course of the opinion, after citing *Wyman* vs. *Halstead*, *supra*, *Vaughan* vs. *Northup*, 15 Pet., 1 and *United States* vs. *Cox*, 18 How., 100, Judge Morris said (page 122):

> "These are all plainly cases of rival administrations, wherein it was held that the administration at the place of death of the deceased person was the proper and paramount administration which the Treasury officials should recognize, and that in antagonism to such administration there was no room at the seat of government for a rival, or a different, administration, by reason of any supposed situs of assets in this district."

Citizens Savings & Trust Co. vs. *Illinois Central R. R. Co.*, 205 U. S., 46, related to the cancellation of deeds and leases of the property of a railroad company all of which was located in the district in which the suit was brought.

Louisville & Nashville R. R. Co. vs. *Western Union Telegraph Co.*, 234 U. S., 369, was a bill in equity to annul the judgments of courts of eminent domain in Mississippi. The land which was the subject-matter of that action was also located within the jurisdiction of the court in which the suit was brought.

So in *Greely* vs. *Lowe*, 155 U. S., 58, and *Dick* vs. *Foraker*, 155 U. S., 404, the suits related to the

title of land situated within the district where the actions were instituted.

Goodman vs. *Niblack*, 102 U. S., 556, related to the title to a fund, which was likewise located within the district whose jurisdiction was invoked.

There is nothing in *Johrer* vs. *Roscoe*, 62 Miss., 699, that affects the adjudication in *McIlroy* vs. *Alsop*, 45 Miss., 365, *supra*. The case involved the question as to whether the property of a Mississippi woman who married an Italian subject and resided in Italy until the time of her death, was to be distributed as "personal property situated in this State" (Mississippi), or pursuant to the laws of Italy. The estate consisted of moneys owing to the decedent, who had died intestate, on loans made by her agent in Mississippi, for which he took promissory notes which were kept in the State of Kentucky. Her agent took out letters of administration in Mississippi. It was held that the notes were to be regarded as personal property situated in Mississippi. The two cases are in complete harmony.

Nor does *Waldron & Co.* vs. *Yates*, 111 Miss., 631, sustain appellant's contention. The question there involved was whether a voucher for the payment of money due was subject to the lien of an enrolled judgment, as personal property, under the provisions of the Mississippi Code of 1906. It was held that it was not, thus indicating that under the law of Mississippi the term "personal property" may in one connection mean one thing and something entirely different when used in another connection.

As further bearing on this phase of the case, it is to be noted that none of the persons who are liable upon the notes described in the bill of com-

plaint is a party to this action. If a decree were rendered in this suit it would have no binding force upon the debtors (*McDonald* vs. *Mabee*, 243 U. S., 90, 91). Nor would the maintenance of the action in any way interfere with the appellee's enforcement of the promissory notes assigned to her by actions brought against the debtors in Mississippi. The decision in *McIlvoy* vs. *Alsop*, *supra*, would enable her to maintain such an action even though she did not have the physical possession of the promissory notes. Nor would such an action prevent the debtors from paying the notes to the appellee. Under the decisions she would have the right to maintain in the District of Mississippi an action similar to that brought by the appellant in the Southern District of New York, and might join the debtors in that action and obtain a judgment binding upon them. So far as the appellant is concerned, the appellee might in that action, by means of substituted service, secure a decree adjudging the title to these notes to be in her.

This in itself presents a sound reason in support of the determination which the appellant is now seeking to review, and shows the futility of an attempted assumption of jurisdiction of this action by the court below. (See *Minor on Conflict of Laws*, §121.)

Judge Knox very pertinently said, speaking of the tribunal in which he was sitting:

> "The fact that this court cannot protect the plaintiff as against any action the debtor may see fit to take, or which the defendant may take as against the debtor, would seem to determine the question as to whether or not

there is within this district any property capable of being made 'subject to the dominion and the resulting control of this court.'"

II.

Not only were these notes not personal property within the district where appellant's suit was brought, but this is not a case for the removal of a cloud upon the title to personal property within the meaning of that phrase as employed in Section 57 of the Judicial Code.

It was certainly not intended by Congress when it enacted this provision, to change the substantive law. It was merely a procedural measure. It did not purport to create a new definition of an action to remove a cloud upon title or to bring within the scope of the principle applicable to the quieting of title new causes of action.

At the time of the enactment of this Statute an action to remove a cloud upon title did not lie, especially in New York for the removal of a cloud upon the title to personal property generally. This is declared in *Smith* vs. *Mayor, &c., of the City of New York*, 68 N. Y., 552, 554. There Judge Earl said:

> "It is difficult to perceive how, upon any theory, the plaintiff can maintain this action. He seeks to have certain assessments and taxes declared illegal and void upon the ground that they are a cloud upon his title. Our attention has been called to no case where such an ac-

tion has been maintained to remove a cloud upon any title except that to real estate, and yet he claims that his pier is not real estate. If it is real estate, it is conceded that the taxes have been legally imposed. If it is not real estate, then there is no precedent in this State for the maintenance of the action. Ward vs. Dewey, 16 N. Y., 519."

In *Red Diamond Clothing Co.* vs. *Steideman*, 129 Mo. App., 519, 97 S. W. Rep., 220, the Court said:

"The first count in all the petitions is to remove a cloud upon the title of personal property in the possession of, and claimed to be the property of, the plaintiff. In State ex rel. vs. Wood, 155 Mo., 446, 18 L. R. A., 396, the court said: 'It would seem to be elementary that in legal parlance cloud upon title arises with reference to real estate only. 6 Am. & Eng. Ency. of Law (2nd ed.) 150, and cases cited. This is the settled law of this State. Lockwood vs. St. Louis, 24 Mo., 20; Leslie vs. St. Louis, 47 Mo., 474; Warrensburg vs. Miller, 77 Mo., 56; Sayre vs. Tompkins, 23 Mo., 443; Bank vs. Kansas City, 73 Mo., 555.' There are exceptions to this elementary rule of equity practice; for instance, to remove a cloud upon attached property in the hands of a sheriff, when the cloud is created by a recorded mortgage. Voss vs. Murray, 50 Ohio St., 19, 32 N. E., 1112. Assignees of property, which they desire to sell, may remove a cloud upon it created by a recorded mortgage, which they claim to be invalid. Sherman vs. Fitch, 98 Mass.,

59. In the latter case the court said: 'The mortgage is upon record, and it is evident that they (the assignees) cannot sell the property with any prospect of obtaining its fair value, because the purchaser would know that he exposes himself to an action if the defendant's claim is well founded.' The same principle of equity is announced in Magnuson vs. Clithero, 101 Wis., 551, 77 N. W., 882. Pomeroy says the action to quiet title 'may be invoked to determine conflicting rights over personal property. * * * It will be seen that each case must stand mainly upon its own circumstances.'"

See also:

Key City Gas Light Co. vs. *Mansell*, 19 Iowa, 305;

Gott vs. *Hoschna*, 57 Mich., 413, 24 N. W. Rep., 123;

Whitlock vs. *Greaves*, 48 N. J. Eq., 379, 21 Atl. Rep., 944.

In *Jones* vs. *Gould*, 149 Fed. Rep., 153, the Circuit Court of Appeals of the Sixth Circuit, consisting of Judges Lurton, Severens and Cochran, made it clear that Section 57 was not intended to apply to intangible and transitory objects. Their exposition is convincing:

"The statute contemplates that the action in which substituted service of process may be made must be one which relates to 'the title to real or personal property within the district,' language which imports a *localized subject*. Further, the action must be one to en-

force some right in it, or to remove some obstruction to the enjoyment of it. It does not concern the rights to property which is intangible and transitory, choses in action and the like, adhering to the person of the owner, who may be here today and abroad tomorrow. Such subjects are not localized, and have never been within the scope of that solicitude which the policy of the state exerts for its inhabitants and over the fixed and tangible objects of ownership within its dominion.

Again, what is the legitimate subject of the kind of action to which the statute has reference? Evidently it must be the title to some property. In strictness, the word 'title' is applicable only to real estate. But it is also sometimes used to denote a similar attribute of personal property. When so used, it has a kindred meaning, *and contemplates some specific tangible thing, having some resemblance to real property in its characteristics which justifies the borrowing of the term. It is rarely, if ever, used to denote the ownership of transitory and intangible objects.* It is singular that, although this statute has been in force for more than thirty years, there should be such a dearth of authority upon the matter of its construction. The validity of State legislation of this kind, so far as it affects titles to real estate, has been repeatedly affirmed; and no doubt is now entertained upon that subject. Arndt vs. Griggs, 134 U. S., 316, and cases which have followed it. And it may be assumed that similar legislation for the judicial control of *localized* personal property would also be sustained. But that is the ex-

tent, so far as we know, to which such legislation has been attempted. * * * The subject was discussed by Mr. Justice Brown in Greeley vs. Lowe, 155 U. S., 58, and, although nothing particularly relevant here was actually decided, the language of the learned justice seems to assume that the subject of controversy in order to justify obtaining jurisdiction by substituted service *must be a res localized within the district.*"

The case just cited was decided six years after the decision in *Jellenik vs. Huron Copper Mining Co.*, 177 U. S., 1. There the property in question was shares of stock in a Michigan corporation whose property was located in Michigan, and it therefore involved an interest in the property of the mining company.

In *Non-Magnetic Watch Co.* vs. *Association Horlogere Suisse*, 44 Fed. Rep., 6, it was held that in a suit to determine the title to a patent right, a non-resident defendant could not be served by publication under the provisions of the statute now under discussion. Judge Lacombe, in the course of his opinion, said:

"The various cases which were cited by the complainant's counsel interpreting this section are concerned either with real property, or with such tangible personal property as was susceptible of reduction to actual possession. I cannot satisfy myself that the section covers (or was intended to cover) such incorporeal and intangible property as a patent right, possession of which must of necessity be ideal, not actual, and which cannot be seized or sold

> under an execution. Stephens vs. Cady, 14 How., 528; Stevens vs. Gladding, 17 How., 447. Statutes which undertake to give to courts jurisdiction over non-residents, who do not come within the district for purposes either of residence or business, should not be enlarged by too liberal construction, and in the absence of authority I must decline to make the order prayed for."

In *Lawrence* vs. *Times Printing Co.*, 90 Fed., Rep., 24, it was held, under the same statute, that the so-called newspaper franchise of a newspaper arising out of a contract with the Associated Press and the circulation of a newspaper are not specific articles of personal property having a legal situs within the district within the meaning of this statute.

In *Wabash Railroad Co.* vs. *West Side Belt R. Co.*, 235 Fed. Rep., 645, *Jones* vs. *Gould*, *supra*, was followed, Judge Thomson saying:

> "The property in question is a chose in action, a debt owing by the West Side Belt, a citizen of this district, to the Wabash Company, a non-resident defendant. The proceeding is therefore an attempt to establish what might be called an attachment lien, or equitable charge upon the moneys in the hands of the West Side Belt Company to answer the debt of an absent defendant."

See also

> *Consolidated Mining Co.* vs. *Callahan Mining Co.*, 228 Fed. Rep., 528.

III.

Not only were the notes which are the subject-matter of this litigation not property in the Southern District of New York within the meaning of Section 57 of the Judicial Code, but the plaintiff wrongfully removed them from Mississippi, where they rightfully belong, in violation of the Statute of that State, and taking advantage of her own wrong, is seeking to bestow upon the District Court of the Southern District of New York a jurisdiction which it does not possess.

We have called attention to the statute of Mississippi which governs executors and administrators and property of a decedent which is in course of administration in the chancery courts of that State. It contains a categorical negative: "*An executor or administrator shall not remove any of the property of the estate out of this State.*" The bill of complaint shows that these notes were, when they died, the property of Eva W. and Ephraim H. Lombard, and the decrees probating their respective wills show that at the time of probate the notes were in Mississippi and were to be administered in the tribunals of that State. In spite of her duty and the prohibition of the statute, the appellant has removed the notes from the jurisdiction of Mississippi. In this aspect of the case the decision in *Cutrer* vs. *Tennessee*, 98 Miss., 849; 35 L. R. A. (N. S.), 333, 337, is illuminating. There in a case bearing a strong resemblance to the present and likewise arising in Coahoma County, Mississippi,

property located in Tennessee and being there administered was wrongfully brought into Mississippi, where the Tennessee jurisdiction was vindicated, the Court saying:

> "That no man can profit by his own wrongdoing is a maxim of the law applying as strongly to the case of an administrator leaving the jurisdiction of his proper accountability and going into a jurisdiction wherein it does not properly lie, seeking thereby to avoid accounting to the court of his appointment, as it does to any other human transaction."

Assuming, for the sake of the argument, that Eva W. Lombard had an interest in these notes which did not go to her husband as survivor, the notes being payable to them jointly, her estate is in process of administration in the jurisdiction where she lived and died, and that of Ephraim H. Lombard is likewise in process of administration there, the wills of both having been probated in the Chancery Court of Mississippi having jurisdiction, and that jurisdiction having been invoked by the plaintiff. She has never received permission to remove these notes from Mississippi, and yet having done so she seeks in a foreign jurisdiction to litigate the title to these notes as against a citizen and resident of Mississippi, whose rights are derived from an assignment executed by Ephraim H. Lombard eleven days prior to the date when he executed his will under which the plaintiff claims the title to these notes.

Having thus brought the notes unlawfully into the State of New York, they cannot be regarded as being within that district, because in and of itself

it is inconsistent with the command of the Mississippi statute to which the plaintiff has voluntarily and deliberately subjected herself. She has come into a court of equity for the purpose of litigating with respect to these notes in a jurisdiction where she could not take a single step unless the property which is the subject-matter of the suit were lawfully in that jurisdiction.

On the well-known maxim that equity regards that to be done which ought to be done, how can jurisdiction by this Court be predicated upon a state of facts running counter to this fundamental and salutary principle? Will it not be applied in such a way as to lead to a presumption that the plaintiff, by yielding obedience to the law of Mississippi, kept within its jurisdiction the property of her father's estate which belonged there? Is she to be heard to say that she disobeyed that law; that she removed from the jurisdiction of the court of chancery of Mississippi property belonging to her father's estate which was being administered by that court, and that property having its legal situs in Mississippi had gained a new situs in New York solely because she had defiantly undertaken to change that situs without the permission of the court which in the first instance had on her petition lawfully assumed jurisdiction over the *res*? Were she to be permitted to occupy a position so extraordinary as that disclosed by the undisputed facts, she would be enabled by her act, violative of the law of Mississippi, to oust the courts of that state of their jurisdiction legally assumed over property and to confer it upon a distant jurisdiction, thus taking advantage of her own wrong?

The principle of *Moran* vs. *Sturges*, 154 U. S., 256, 274 has likewise been violated by the appellant.

There is nothing clearer than that courts will not lend their aid to one whose status rests on so unconscionable a basis. Illustrations of the application of this principle are not lacking. One of the most interesting is afforded by *Riggs* vs. *Palmer*, 115 N. Y., 506.

There a beneficiary under a will, in order that he might prevent revocation of the provisions in his favor and obtain the speedy enjoyment and possession of the property, wilfully murdered the testator. Under the terms of the will the murderer would have taken the property. Under the law of descent he would likewise have taken it. Yet it was decided that, because of the crime committed by the beneficiary, the Court would not permit him to benefit out of the estate left by his victim, either as donee under the will or as heir or next of kin. It is apparent that the Court absolutely disregarded not only the terms of a valid will, but also of a statute, in order to prevent the wrongdoer from profiting by his wrong. Judge Earl, in the course of his opinion, said:

> "What could be more unreasonable than to suppose that it was the legislative intention in the general laws passed for the orderly, peaceable and just devolution of property, that they should have operation in favor of one who murdered his ancestor that he might speedily come into the possession of his estate? Such an intention is inconceivable. We need not, therefore, be much troubled by the general language contained in the laws. Besides, all

laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes. They were applied in the decision of the case of the New York Mutual Life Insurance Company vs Armstrong, 117 U. S., 591."

See also:

McDowall vs. *Sheehan*, 129 N. Y., 206, 207;
Walden vs. *City of Jamestown*, 178 N. Y., 216;
Roche vs. *Nason*, 185 N. Y., 136.

This principle has been frequently applied in cases where jurisdiction over a defendant is sought to be acquired by means of unlawful, fraudulent or inequitable acts of the plaintiff.

It was recognized in *Fitzgerald Constr. Co.* vs. *Fitzgerald*, 137 U. S., 105, where Chief Justice Fuller said:

"There was no pretense that property had been brought into the state by means of fraudulent inducement, or that the claim against the garnishee was fictitious."

In *Commercial Mutual Accident Co.* vs. *Davis*, 213 U. S., 256, Mr. Justice Day remarked:

> "It is undoubtedly true that if a person is induced by artifice or fraud to come within the jurisdiction of the Court for the purpose of procuring service of process, such fraudulent abuse of the writ will be set aside upon a proper showing."

So, in *Cavanagh* vs. *Manhattan Transit Co.*, 133 Fed. Rep., 818, process was set aside where the plaintiff's agent induced the secretary of the defendant corporation, which was a resident of New York, to come into New Jersey for an interview with reference to certain machinery purchased from the defendant, and at the close of the interview, as the secretary was leaving the place where it was held, process was served upon him. Judge Lanning, citing in support of his decision *Steiger* vs. *Bonn*, 4 Fed. Rep., 17, and *Reed* vs. *Williams*, 29 N. J. Law, 385, held that where a party on whom a summons is served is induced to come into the state by a deception practised upon him by the plaintiff for the purpose of serving the summons, the service will be set aside.

In *Olean Street Railway Co.* vs. *Fairmount Construction Co.*, 55 App. Div., 292, the service of a summons upon the president of the defendant while in the State of New York on invitation of the plaintiff's president for the purpose of adjusting a claim against the defendant, was set aside, even though plaintiff's president denied that the invitation was a trick or device for the purpose of obtaining the service, the Court holding that it would not sanction any attempt to bring a party within its jurisdiction by fraud or misrepresentation or any act savoring of *male fides*.

Among other cases decided by the courts of New York to this same effect, are:

Snelling vs. *Watrous*, 2 Paige, 314;
Carpenter vs. *Spooner*, 2 Sandf., 717;
Metcalf vs. *Clark*, 21 Barb., 45.
Beacom vs. *Rogers*, 79 Hun., 220;
Goupil vs. *Simonson*, 3 Abb. Pr., 474;
Binninghoff vs. *Oswell*, 37 How. Pr., 235;
Baker vs. *Wales*, 14 Abb. N. S., 331;
Higgins vs. *Dewey*, 27 Abb. N. C., 81.

The same rule has been applied in cases where a plaintiff brought a defendant into his jurisdiction by means of extradition or interstate rendition proceedings and then undertook to serve process upon him in a civil action, even though a third party might have sued the defendant when brought into the state by means of the extradition proceedings.

Williams vs. *Bacon*, 10 Wend., 676;
Slade vs. *Joseph*, 5 Daly, 187;
Adriance vs. *Lagrave*, 59 N. Y., 110;
In re Baruch, 41 Fed. Rep., 472.

Citations might be multiplied from other jurisdictions, but the rule is so well established that the mere statement of it suffices. A litigant cannot, by pursuing unfair methods, secure jurisdiction over a non-resident of the state whose courts are invoked. It is a fraud upon the court whose intervention is sought, it is an attempt on the part of the plaintiff to profit by his own wrong, and the administration of justice would be seriously impugned were it possible to set a court in motion by an act which in itself is a violation of law.

If the plaintiff has a cause of action she has an ample remedy in the jurisdiction where the defendant resides, where those indebted upon these promissory notes reside, and where the estate to which these notes belong is being administered by the duly constituted tribunals of that jurisdiction. Disregarding, however, these outstanding facts, the plaintiff has sought by trick and device and by a violation of the law of Mississippi, to create a fictitious jurisdiction. Were she to succeed in this effort then one tortiously coming into possession of personal property in Massachusetts might carry it to Arizona and there institute a *quia-timet* action with respect to the property, conferring jurisdiction over the eloigned property on the Arizona court by constructive service on the Massachusetts owner.

IV.

The plaintiff's case is entirely devoid of equity, because she has not come into court with clean hands.

This appears not only from the facts which have been considered under Point II, but also from the concessions contained in the bill of complaint that the very will on which she predicates her alleged title to these notes was executed by her father at a time when he was not mentally competent to make a will. The allegations of the complaint and the facts relative to the probate of the will are fully set forth in the Statement of Facts. How, then, is it possible for any court, and especially a court of equity, to listen to a complainant who is seeking relief which is in its essential nature equit-

able, when by her own statement she shows that her alleged cause of action is founded on a will executed by an incompetent testator?

Here, again, an elementary principle comes into operation, that he who comes into equity must come with clean hands. We content ourselves by calling attention to the following authorities:

1 *Pomeroy's Eq. Jur.*, §404;
Brotzman's Appeal, 119 Pa. St. 645;
Gilmore vs. *Thomas*, 252 Mo. 147, 158 S. W. Rep., 577;
Primeau vs. *Granfield*, 193 Fed. Rep., 911;
Danciger vs. *Stone*, 187 Fed. Rep., 853;
Memphis Keeley Institute vs. *Leslie E. Keeley Co.*, 155 Fed. Rep., 964;
Class vs. *Strack*, 85 N. J. Eq., 319, 96 Atl. Rep., 405, 407;
Pearson vs. *Murray*, 230 Mo., 162, 130 S. W. Rep., 21;
Sinsheimer vs. *United Garment Workers*, 77 Hun, 215;
Comstock vs. *Johnson*, 46 N. Y., 221;
McMullen vs. *Hoffman*, 174 U. S., 639, 656.

V.

The judgment appealed from should be affirmed.

LOUIS MARSHALL,
JAMES MARSHALL,
Appearing specially for the Appellee.